UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
ATLANTA BRANCH OFFICE
DIVISION OF JUDGES

McKENZIE ENGINEERING CO.

and **Case 33–CA–11408**

CARPENTERS LOCAL UNION 410,
UNITED BROTHERHOOD OF CARPENTERS
AND JOINERS OF AMERICA, AFL-CIO

***Deborah A. Fisher, Esq.,* for the General Counsel.**
David J. Lauth, Esq., and Jennifer Dellmuth, Esq.,
for the Respondent.
***Karl Masters, Esq.,* for the Charging Party.**

SUPPLEMENTAL DECISION

Statement of the Case

MICHAEL A. MARCIONESE, Administrative Law Judge. I heard this compliance case in Peoria, Illinois, on November 2 and 3, 2005. The hearing was held pursuant to a remand ordered by the Court of Appeals, which had denied enforcement to part of the Board's Supplemental Decision and Order reported at 336 NLRB 336 (2001). *McKenzie Engineering Co. v. NLRB,* 373 F.3d 888 (8th Cir. 2004). The issue on remand is the amount of back pay owed to the four named discriminatees who were previously found to have been unlawfully discharged on November 1, 1995. *McKenzie Engineering Co.,* 326 NLRB 473 (1998). The General Counsel, the Respondent, and the Charging Party were ably represented by counsel at the hearing and all parties have filed briefs. The Respondent also filed a reply brief, which had been permitted in order to allow the parties to address any new calculations or theories advanced in the initial briefs. Having considered the evidence presented at the hearing and the arguments made by counsel, I now make the following

Findings of Fact

I. *History of the Case*

The Respondent, headquartered in Ft. Madison, Iowa, is a marine construction contractor working along the Mississippi River. Robert McKenzie is the Respondent's owner and president. From its founding until the unfair labor practices found in the underlying case, the Respondent had a collective-bargaining relationship with the Charging Party Union. In *McKenzie Engineering Co.,* 326 NLRB 473 (1998), the Board found, inter alia, that the Respondent violated Section 8(a)(1) and (5) of the Act by repudiating its collective bargaining agreement with the Union and Section 8(a)(1) and (3) of the Act by discharging Fred Arnold, Jr., Donald Patterson, Steve Perry and Mark Spiekermeier on February 1, 1995 because of their membership in the Union and as part of an overall plan to repudiate the collective bargaining agreement. As part of the remedy for these violations, the Board ordered the Respondent to offer reinstatement to the four discriminatees and to make them whole for lost wages and

benefits. On June 25, 1999, the Court of Appeals enforced the Board's order in relevant part but determined that issues raised by the Respondent regarding the appropriateness of the reinstatement remedy should be resolved at the compliance stage of the proceeding. *McKenzie Engineering Co. v. NLRB,* 182 F.3d 622 (8th Cir. 1999). On November 6 and 7, 2000, a compliance hearing was held before Administrative Law Judge Marion Ladwig to resolve the reinstatement and back pay issues. Judge Ladwig issued his supplemental decision on July 20, 2001, which the Board adopted on September 28, 2001. *McKenzie Engineering Co.,* 336 NLRB 336. The Board's Supplemental Decision and Order directed the Respondent to make whole the four discriminatees by paying a total of $130,515.70, plus interest. The Board ordered further that back pay for Arnold, Patterson and Spiekermeier would continue to accrue until such time as the Respondent made a valid offer of reinstatement to them. No further reinstatement remedy was ordered for Perry and back pay was tolled for him because he died in October 1999 while the case was pending. The Respondent's appeal of the Board's Supplemental Order led to the Court of Appeals' decision remanding the case for this hearing.

In denying enforcement of the Board's back pay order, the Court concluded that the Board's order, as it related to the four wrongfully discharged employees, was not supported by substantial evidence. Specifically, the Court concluded that the Board's back pay order improperly assumed that each of the surviving three discriminatees would have worked full-time for the Respondent until the date of the court's decision, which at that time would have been 400 weeks. Because there was no evidence in the record that any non-supervisory employee had ever worked for the Respondent for that length of time or that any of the discriminatees had ever held a single job for anywhere near that long, the Court determined that the award was a windfall to the employees and unduly punitive toward the Respondent. At the same time, the Court rejected the Respondent's contentions that back pay should be limited to the 31-week average length of employment of its employees or to the period prior to expiration of the last collective bargaining agreement on April 30, 1997. According to the Court, there was "abundant evidence in the record to support the conclusion that the fired employees would (or could) have continued their employment with the Respondent beyond 31 weeks." The Court further found that any doubt whether the discriminatees would have continued working for the Respondent beyond the expiration of the collective bargaining agreement must be resolved against the Respondent under well-established legal precedent. See *NLRB v. Madison Courier, Inc.,* 472 F.2d 1307, 1321 (D.C. Cir. 1972), cited by the Court.

After rejecting both the Board's and the Respondent's claims as to the appropriate amount of back pay, the Court determined that that there was substantial evidence to support the conclusion that each of the discriminatees would have worked for the Respondent for substantial lengths of time had they not been fired. The Court concluded that the record would support an award of back pay based on "the amount of time the employees spent working for the employer with whom they had the longest tenure following their dismissal." In order to illustrate this, the Court used Patterson's work history between his termination and the compliance hearing, noting that he had worked for one of his interim employers, the Des Moines Historical Society, for 169 weeks out of the 255 weeks in the back pay period to date. The Court then stated

> Based on this work record, Patterson should receive back pay (and fringe benefits until April 30, 1997) for sixty-six percent of the time (169 divided by 255) expended by McKenzie on subsequent projects until McKenzie offers him reemployment.

The Court directed the Board, on remand, to

> take additional evidence on the fired employees' work histories and issue a back-

> pay award that is not inconsistent with this opinion. An award that follows our suggested formula will be based more strictly on the work histories of the discharged employees (which appear to reflect the McKenzie labor pool as a whole) and will be more precisely "tailored to expunge only the *actual,* and not merely *speculative,* consequences of the unfair labor practices."

373 F.2d 888, 894-895 (2004). (citation and footnote omitted; emphasis in original).

Following the remand, the Respondent offered reinstatement to the three surviving discriminatees (Arnold, Patterson and Spiekermeier) on September 29, 2004. Because the parties were unable to agree on a method to apply the Court's formula to determine the back pay owed the discriminatees, the General Counsel issued a new compliance specification and notice of hearing on February 25, 2005, which it amended at the hearing. On March 17, 2005, the Respondent filed its answer to the compliance specification, which it amended on October 28, 2005. At the hearing, the General Counsel presented the testimony of Gregory Ramsay, the Region's compliance officer, describing the formula he devised to comply with the Court's order. The Respondent presented McKenzie who described three alternative formulas he devised based on various interpretations of the Court's opinion. My task in this decision is to determine which of these competing formulas is consistent with the Court's remand order. As the Court acknowledged, it is impossible to precisely determine the amount of back pay that should be awarded. The goal, in this as in any compliance proceeding, is to find a formula reasonably designed to produce an award that is as close an approximation as possible to the amount the discharged employee would have earned absent the unlawful discrimination. *Id.,* at fn. 3.

II. *The Adjustment Factor*

As the Respondent concedes in its brief, many of the facts necessary to determine back pay were decided in the earlier compliance proceeding and affirmed on appeal and are thus no longer in dispute. There is no dispute that the back pay period for each discriminatee runs from the November 1, 1995 date of discharge until the date each either left the workforce or was offered reinstatement. Perry's back pay period ended with his death on October 21, 1999; Arnold's back pay period ended with his retirement on May 24, 2001[1]; while Patterson's and Spiekermeier's back pay continued to accrue until the Respondent offered them reinstatement on September 29, 2004. The Respondent stipulated in the earlier proceeding and concedes here that the methodology used by the General Counsel to determine gross back pay was reasonable. The Respondent has also agreed to the wage rates used to determine gross back pay, i.e. the contract hourly rate of $17.65 for Arnold and Spiekermeier; the foreman's rate of $18.65 for Patterson; and the apprentice rate for Perry, which gradually increased during his back pay period from $8.83 to $15.00 per hour. The Respondent, with minor exceptions to be discussed, has also accepted the interim earnings reported for the discriminatees in the specification and the interim expenses claimed by Patterson, the only discriminatee to make such a claim.

In the first compliance proceeding in 2000, the Respondent challenged the mitigation efforts of only one discriminatee, Spiekermeier. Judge Ladwig found that Respondent failed to prove that Spiekermeier was not diligently seeking work or that he refused any available employment. That finding was not challenged on appeal and is conclusive here through the date

[1] Arnold, who was called as a witness by the Respondent, testified in this proceeding that he returned to the workforce at some point before 2004. Nevertheless, neither the General Counsel nor the Charging Party seeks back pay for any period after May 24, 2001.

of the last hearing. The Respondent did not contend then that either Patterson or Arnold was not diligently seeking work during the back pay period. In this proceeding, the Respondent again challenged Spiekermeier's efforts to find interim employment and also raised for the first time a claim that Patterson had not sufficiently mitigated back pay. These issues will be discussed later in this decision.

With respect to the issue on remand, the parties agree as to the length of time each discriminatee worked for the employer with whom he worked the longest during the back pay period, one factor in applying the Court's formula. There is no dispute that Arnold worked 173 weeks at Allied Construction Services, Inc. out of the 289 weeks in his back pay period; that Patterson worked 341 weeks, out of a total of 463 weeks, for the Des Moines County Historical Society; that Spiekermeier worked 130 weeks, out of the 463 weeks in his period, for Allied Construction Services, Inc. and that Perry worked 139 weeks for Orba Johnson Transshipment during his back pay period.[2] Dividing the weeks worked at each individual's longest interim employer by the total weeks in each back pay period provides a number, referred to by the parties as the adjustment factor, which the Court suggested be used to determine back pay. The difference between the parties' varied approaches is whether the weeks worked are calendar weeks or a standard 40-hour week, and whether the resulting adjustment factor should be applied to gross back pay or net back pay. The parties also disagree whether the adjustment factor should be applied to the fringe benefit contributions owed on behalf of three of the discriminatees.[3]

Ramsay, the Region's compliance officer, testified that, upon receipt of the remand order, he re-calculated the back pay owed to Arnold, Patterson, Perry and Spiekermeier by starting with the figures that had been developed by Ronald Symkowiak, his predecessor as compliance officer, and extending the calculations beyond the November 2000 date of the compliance hearing to the end of the respective back pay period for each discriminatee. Before applying the adjustment factor that the Court of Appeals devised, Ramsay updated the gross back pay amounts by using the same methodology that Symkowiak had used to determine the gross back pay for the period preceding the first compliance hearing.[4] Specifically, Ramsay went through the Respondent's payroll records to determine the number of hours that employees who replaced the discriminatees worked for the Respondent during the period from October 19, 2000, the last pay period for which Symkowiak had information, until September 29, 2004, the date the Respondent finally offered reinstatement to the two remaining discriminatees.[5] He then assigned these hours to the discriminatees in order of seniority, first to Patterson, then to Spiekermeier, then to Arnold and then to Perry. He only assigned hours to Arnold and Perry through the end of their respective back pay periods. After assigning hours to the discriminatees, Ramsay calculated the quarterly gross back pay for each discriminatee by multiplying the number of hours assigned per quarter by the hourly rate set forth above for each discriminatee. Ramsay then subtracted from this gross quarterly back pay amount whatever

[2] The General Counsel calculated Perry's back pay period at 206 weeks while the Respondent counted it as 206.5 weeks.

[3] There is no dispute that, under the Respondent's collective bargaining agreement with the Union, no fringe benefit contributions were owed on behalf of Perry because of his status as an apprentice.

[4] As noted above, the Respondent had stipulated at the first hearing that this methodology was reasonable.

[5] Ramsay excluded any hours worked by supervisors, drivers, and other employees who had union affiliations other than the Charging Party. This is the same procedure followed by Symkowiak.

interim earnings had been received by the discriminatees in that quarter, as reflected in the attachments to the amended compliance specification. This calculation resulted in a net back pay figure for each quarter of the back pay period for each discriminatee. Ramsay then applied an adjustment factor to the net back pay figure for each quarter based on his interpretation of the Court's opinion. Finally, he calculated a total net back pay figure for each discriminatee by adding their respective quarterly adjusted net back pay amounts.

Ramsay calculated each discriminatee's adjustment factor by taking the number of weeks each worked for the interim employer with whom he had the longest tenure and dividing that number by the total number of weeks in each discriminatee's back pay period. This is the approach the Court suggested by way of illustration using Patterson as an example.[6] Specifically, the adjustment factor Ramsay calculated for Arnold was 173 divided by 289, or 60%; the adjustment factor calculated for Patterson was 341 divided by 463, or 74%; the adjustment factor calculated for Perry was 139 divided by 206, or 67%[7]; and the adjustment factor calculated for Spiekermeier was 130 divided by 463, or 28%. Applying these adjustment factors to the net back pay for each discriminatee results in the following back pay figures, which the General Counsel claimed at the hearing was the amount owed by the Respondent to satisfy the Board's remedial order as modified by the Court's decision[8]:

Fred Arnold, Jr.	$ 5,462.87
Donald Patterson	69,900.47
Steve Perry	3,826.43
Mark Spiekermeier	22,000.35

Ramsay also updated Symkowiak's calculations of the fringe benefit contributions owed on behalf of Arnold, Patterson and Spiekermeier but he did not apply the adjustment factor to these amounts. Ramsay testified that he concluded it was not necessary to reduce these amounts because the total period for which fringe benefit contributions were owed, 77 weeks, was far exceeded by the longest tenure each of these three discriminatees had with a single interim employer during the back pay period.[9] Based on this conclusion, the General Counsel is seeking the following amounts for fringe benefits for each discriminatee:

Fred Arnold, Jr.	$4,264.76
Donald Patterson	5,951.94
Mark Spiekermeier	5,312.37

The Respondent has accepted these figures as correct for the gross amount of fringe benefit contributions owed but, as will be discussed below, disagrees with Ramsay's failure to reduce these amounts by the Court's adjustment factor.

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[6] As noted above, the parties are in agreement, with one minor exception, as to the two factors in this equation.

[7] Using the number of weeks that Respondent calculated for Perry's total back pay period, i.e. 206.5, results in the same percentage used by Ramsay as the adjustment factor for Perry.

[8] Counsel for General Counsel submitted revised calculations with her brief that she moved be admitted as General Counsel Exhibit 18. I will address this motion in the next section of this decision.

[9] Under the Board's order, fringe benefit contributions were only owed through April 30, 1997, the date the last collective bargaining agreement between the Respondent and the Union expired.

McKenzie testified for the Respondent that he also calculated back pay for the discriminatees based on his interpretation of the Court's opinion. Unlike Ramsay, however, McKenzie came up with three ways to adjust the discriminatees' back pay applying the Court's opinion. One method adopted by McKenzie was to use the adjustment factor calculated by Ramsay and apply it to gross back pay, rather than net back pay.[10] The Respondent then subtracted the total interim earnings reported by the General Counsel from the adjusted gross back pay figure to arrive at net back pay. This approach results in total net back pay for each discriminatee as follows:

Fred Arnold, Jr.	$ 1,439.47
Donald Patterson	37,796.67
Steve Perry	2,970.57
Mark Spiekermeier	10,560.87[11]

Although this approach reduced the back pay due each discriminatee, it was not McKenzie's preferred approach.

McKenzie preferred basing the adjustment factor on the number of full-time equivalent (FTE) weeks, rather than calendar weeks, that each discriminatee worked for the interim employer with whom he had the longest tenure during the back pay period. According to McKenzie, he interpreted the Court's reference to "weeks" in its decision to a 40-hour week because that represents a standard work week in this country. McKenzie testified further that virtually everyone in his company works a 40-hour week. However, he was forced to concede, on cross-examination, that the Respondent's payroll records contradict this testimony. A review of the hours worked by employees hired after the Respondent discharged the discriminatees shows that they routinely worked less than 40 hours a week. Counsel for the General Counsel also pointed out, on cross-examination, that the total hours assigned to each discriminatee in calculating gross back pay averaged far less than 40 hours a week when averaged over each discriminatee's back pay period. Nevertheless, McKenzie insisted that his was the fairest approach and the most consistent with the Court's opinion.

In applying his FTE-based formula, McKenzie divided the total hours worked by each discriminatee for the longest employer by 40 to come up with a number of FTE weeks. He then divided that by the total weeks in each discriminatee's back pay period to arrive at his adjustment factor. Specifically, for Arnold, the records from Allied Construction Services showed that he worked a total of 6024.5 hours over 173 weeks. Divided by 40 hours, Arnold had 150.6 FTE weeks. McKenzie divided this by the 289 weeks in Arnold's back pay period to reach an adjustment factor of 52.11%. McKenzie testified that correspondence from the Des Moines County Historical Society, Patterson's longest-tenured interim employer, showed that he averaged 25 hours a week over the 341 weeks he worked there. McKenzie testified that this represents 62.5% of a 40 hour week which McKenzie used to translate Patterson's 341 weeks to 213.125 FTE weeks. When this latter number is divided by the 463 weeks in Patterson's back pay period, the result is an adjustment factor of 46.03%. Records from Orba Johnson Transshipment showed that Perry worked a total of 5900 hours, including overtime, for that employer during the 139 weeks he worked there. McKenzie calculated that this represented

[10] Ramsay acknowledged, on cross-examination, that he initially used this approach when he first attempted to re-calculate back pay under the terms of the Court's order.

[11] The Respondent used different interim earnings amounts for two quarters of Spiekermeier's back pay period (Q2 and Q3 of 2000) based on actual earnings reported by the interim employer, Allied Construction Services, for those quarters.

147.5 FTE weeks and, when divided by the 206.5 weeks in Perry's back pay period, results in an adjustment factor of 71.43%. Finally, Spiekermeier was shown to have worked for Allied Construction Services a total of 4381.5 hours over the 130 weeks he worked for that employer which McKenzie converted to 109.5 FTE weeks. When this latter number is divided by the 463 weeks in Spiekermeier's back pay period, he is left with an adjustment factor of 23.65%.

McKenzie testified that he applied his FTE-based adjustment factor to both gross back pay and to net back pay. In doing so, he came up with the following amounts:

Discriminatee	**McKenzie FTE-Based Adjustment Applied to**	
	Gross Back Pay	**Net Back Pay**
Arnold	$1,078.36	$ 4,744.50
Patterson	9,635.10	43,479.98
Perry	3,338.47	4,079.44
Spiekermeier	8,223.27	16,705.72

When asked which of these two calculations he believed most closely approximated the adjustment envisioned by the Court of Appeals, McKenzie said the first, which resulted in the least amount of back pay being owed to the discriminatees.

The Respondent also applied the adjustment factor to the gross fringe benefit contributions calculated by the General Counsel. According to the Respondent, this is consistent with the Court's view that the discriminatees would not have worked every job available with the Respondent during the back pay period. The fringe benefit contributions should be reduced for the same reason that the Court devised an adjustment factor to apply to lost wages. Applying the General Counsel's adjustment factor to gross fringe benefit contributions results in the following amounts:

Arnold	$2,558.86
Patterson	4,404.44
Spiekermeier	1,487.46

Applying the Respondent's FTE-based adjustment factor results in the following fringe benefit contributions being owed:

Arnold	$2,222.37
Patterson	2,739.68
Spiekermeier	1,256.38.

The task here, as directed by the Court of Appeals, is to re-calculate back pay in a manner "not inconsistent with [the Court's] opinion" that more closely approximates what each discriminatee would have earned absent the Respondent's unlawful discrimination against them. It is clear from the Court's opinion that an award based on the discriminatee's employment history as well as the Respondent's history of employing workers would meet this goal. As presented by the parties at the hearing, there are two issues to address before re-calculating back pay. The first is whether the adjustment factor should be based on calendar weeks, as advanced by the General Counsel and the Charging Party, or on FTE weeks, as proposed by the Respondent. The second issue is whether the adjustment factor should be applied to gross back pay, as the Respondent would, or to net back pay, as would the General Counsel and the Charging Party.

In arguing for an adjustment factor based on FTE weeks, the Respondent focuses on language in the Court's opinion indicating that back pay should be based on the amount of "time" each discriminatee spent working for the longest interim employer. The Respondent argues that "time" means actual hours spent working for the interim employer, not calendar weeks. This ignores the Court's use of calendar weeks in the example it provided to show how the back pay should be calculated for Patterson. The Respondent attempts to avoid the obvious application of that example by suggesting that the court was unaware that Patterson only averaged 25 hours a week at the Des Moines Historical Society, the interim employer used in the Court's example. The General Counsel took the obvious approach and used calendar weeks, just as the Court had done in the Patterson example. I conclude that the General Counsel's approach is the most consistent with the intent of the Court in its remand order and the evidence in the record.

The General Counsel, in determining the adjustment factor that would be used to re-calculate back pay, used the same formula the Court used, carried it forward based on updated evidence regarding Patterson's employment history since the first compliance hearing, and then applied the same formula to the other discriminatees. Nothing in the Court's opinion suggests that it intended a further calculation to convert the hours worked by the discriminatees into a standard 40-hour week before employing the formula it cited as an example. The Court could not have been unaware of the fact that the discriminatees were not working a standard 40-hour week at their interim employment because the record from the November 2000 compliance hearing contained this evidence. Moreover, the evidence in that record also showed that the employees hired by the Respondent after it discharged the discriminatees were not working a standard 40-hour work week. Because the Court wanted the back pay award to more closely reflect the work history of the discriminatees and those hired to replace them, use of calendar weeks, without regard to the actual hours worked in those weeks, is the more reasonable and logical approach.

The Court, after calculating Patterson's adjustment factor by dividing the number of weeks he worked for the Des Moines Historical Society by the total number of weeks in his back pay period, directed that "Patterson should receive back pay (and fringe benefits until April 30, 1997) for sixty-six per cent of the time (169 divided by 255) expended by McKenzie on subsequent projects until McKenzie offers him reemployment." At first glance, it would appear that the approach taken by the Respondent, and initially by the Region's compliance officer, of applying the adjustment factor to gross back pay, would be consistent with the Court's opinion. However, if the adjustment factor is not applied to interim earnings as well, then the Respondent would be given credit for interim earnings that do not match gross back pay, a result inconsistent with the Board's long-established formula for computing back pay on a quarterly basis. See *F. W. Woolworth Co.,* 90 NLRB 289 (1950). The quarterly method of calculating back pay, adopted there, was intended to avoid the unfairness of interim earnings in one period reducing or eliminating a make whole remedy in other periods. Similarly, here, if the discriminatee's interim earnings are not reduced by the adjustment factor to reflect the lower available hours in the gross back pay period, the Respondent would get the benefit of the employee's success in obtaining interim employment for periods when, under the Court's opinion, it would not have employed the discriminatees. The General Counsel's approach, i.e. applying the adjustment factor to the net quarterly back pay amount, is a short hand way of reducing gross back pay and interim earnings to reflect the actual work history of the Respondent's employees during the back pay period while matching interim earnings to gross back pay.

Although I have found the General Counsel's approach of applying an adjustment factor based on calendar weeks to net quarterly back pay consistent with the Court's remand order, I disagree with the approach taken by the General Counsel to the fringe benefit contributions owed under the Board's remedial order. It is inconsistent to reduce back pay to reflect less work opportunities while not reducing the fringe benefit contributions that would be owed as a result of this work. It is clear from the Patterson example in the Court's opinion, as quoted above, that the Court intended that any fringe benefit contributions owed on his behalf would also be reduced by the 66% factor calculated by the Court. Otherwise, the discriminatees would be given credit for all hours available during the period prior to the expiration of the collective bargaining agreement for purposes of calculating fringe benefits even though they are not being given credit for all those hours in terms of missed work opportunities. This is similar to the unfairness described above resulting from the Respondent's failure to match interim earnings to gross back pay. Accordingly, I shall recommend that the adjustment factor calculated by the General Counsel be applied to reduce the fringe benefit contributions owed on behalf of Arnold, Patterson and Spiekermeier for the period from the date of discharge until the April 30, 1997 expiration of the collective bargaining agreement requiring those contributions.

Before applying the adjustment factor to re-calculate back pay, I must first resolve two other issues. The first is the General Counsel's post-hearing motion to receive revised back pay calculations as General Counsel Exhibit 18 and the second is the Respondent's claims that Spiekermeier and Patterson did not properly mitigate back pay.

III. *Corrections to Pre-2000 Calculations*

Compliance Officer Ramsay testified that he uncovered several obvious mathematical errors in his predecessor's calculations while re-calculating back pay pursuant to the Court's remand. According to Ramsay, he corrected these errors when he updated the back pay calculations before applying the adjustment factor described above. Specifically, as reflected in General Counsel's Exhibit 2(a), Ramsay corrected Arnold's back pay for the fourth quarter of 1999 where his predecessor erroneously assigned only one hour of gross back pay instead of the 440 hours he would have been entitled to by application of the agreed-upon formula. This resulted in an increase in the net back pay claimed for Arnold. Ramsay also made corrections in the interim earnings reported for Patterson for all of 1999 through the first three quarters of 2000 based on more accurate information. This resulted in a slight increase in Patterson's net back pay. Ramsay also made several corrections to the assigned hours for Spiekermeier in 1996, 1998 and 1999 which resulted in a decrease in both the net back pay and fringe benefit contributions claimed on his behalf. The combined effect of these corrections was a decrease of $101.20 in the total amount sought by the General Counsel.

During cross-examination by Respondent's counsel, Ramsay acknowledged several other errors in the calculations made before the 2000 compliance hearing. All of these involved a discrepancy between interim earnings figures that had been reported on the compliance specification used at the first hearing in 2000 and earnings figures in documents that had been submitted during the compliance investigation. For example, the pre-2000 calculations showed interim earnings for Spiekermeier from Allied Construction Services, in second and third quarters of 2000, of $2,665.02 and $11,608.80, respectively. The payroll records submitted by Allied showed actual earnings for those quarters to be $10,805.41 and $8,995.40, respectively.[12] Ramsay could not explain the discrepancy because he was not involved in

[12] The payroll records relied upon by Respondent were not available at the time the 2000 calculations were done.

preparing the calculation for the 2000 compliance specification. However, he conceded that, had he been making the calculations from scratch, he would have used the figures reported by Allied for those quarters. Respondent's counsel also pointed out, on cross-examination, that there were discrepancies between the interim earnings reported for Arnold and Perry in 1996 and the amounts reflected on W-2 forms submitted with their 1996 tax returns.[13] Ramsay admitted that he did not review all of the interim earnings reports for the period prior to the November 2000 hearing for accuracy.

When these discrepancies were raised at the hearing, I asked the parties to address in their briefs whether it was proper, in light of the limited purpose of the remand, to re-visit calculations that were part of the record in the prior proceeding. Because the Respondent presumably could have pointed out such inaccuracies in the proceeding before Judge Ladwig, or by exceptions filed with the Board or in its appeal to the Court, it arguably would be precluded from doing so now. Based on these concerns, Counsel for General Counsel filed with her brief, and moved for admission into evidence, a revised back pay calculation, identified as General Counsel Exhibit 18, which rescinded the corrections Ramsay had made to the pre-2000 calculations.[14] Counsel for General Counsel argued that there was no authority in the Court's remand order for re-opening the calculations that had been part of the record in that case. She cited *FKW, Inc.,* 321 NLRB 93 (1996) for the proposition that Respondent had waived any objections to those calculations by not pursuing them in a timely manner. In its Reply Brief, the Respondent opposed the General Counsel's motion, arguing that it was appropriate, in the interest of ensuring accuracy in back pay calculations, to make these corrections of obvious errors.

The Court of Appeals, in denying enforcement to the Board's supplemental decision in this case, did not address the accuracy of the calculations. The Court remanded the proceeding for the limited purpose of re-calculating back pay based on its determination that the discriminatees would not have been continuously employed by the Respondent during the back pay period. It instructed the Board, and by extension the administrative law judge, to take additional evidence on the discriminatees' work history and issue a back pay award consistent with its opinion. To comply with the Court's remand, it is only necessary to update the work history of each discriminatee in order to arrive at the adjustment factor devised by the Court and apply that to determine an appropriate back pay award. It was not necessary to re-visit the calculations that had been done before the 2000 compliance hearing and it is unlikely the Court intended such a result. As is evident from the testimony of Ramsay, mathematical errors are not uncommon in these proceedings. Those corrections made by Ramsay on his own motion amounted to an insignificant decrease in the back pay liability.

The changes sought by the Respondent were more substantial but also go beyond the terms of the remand order. The Respondent's efforts to "correct" the interim earnings reported for Arnold, Perry and Spiekermeier in certain quarters in 1996 and 2000 would reduce its back pay liability. Under well-established Board law, the Respondent bears the burden of proof with respect to all aspects of a back pay calculation that would reduce gross back pay, such as interim earnings. *NLRB v. Brown & Root, Inc.,* 311 F.2d 447 (8th Cir. 1963); *Rainbow Coaches,* 280 NLRB 166 (1986). Because the corrections now sought affect the calculations that existed

[13] The total of all Arnold's W-2s for 1996 was $776.50 more than the interim earnings reported for that year. Similarly, the total of all W-2s for Perry for 1996 was $1742 more than the amount reported in the compliance specification.

[14] General Counsel's Exhibit 18, which was attached to her brief as Attachment D, is attached to this decision as Appendix A.

prior to the November 2000 hearing, the Respondent's counsel could have questioned Mr. Ramsay's predecessor regarding any discrepancies between Arnold's and Perry's W-2s and the amounts in the compliance specification at that hearing, in much the same way he did here.[15] Even with respect to the more accurate information received after the hearing from interim employer Allied Construction regarding Spiekermeier's earnings in the second and third quarter of 2000, there is no reason why the Respondent could not have obtained this information, which existed at the time, by subpoena for use at the November 2000 hearing. Respondent in fact stipulated to the accuracy of the interim earnings amounts at that hearing, choosing not to challenge the compliance officer's calculations.

Having considered the matter and the arguments of the parties, and in the interest of finality, I shall grant General Counsel's motion and shall receive General Counsel's Exhibit 18 into evidence, thereby rescinding the corrections made by Ramsay to his predecessor's back pay calculations for the period prior to the November 2000 hearing. I shall also reject the corrections proposed by the Respondent to those same calculations. See *Bethea v. Levi Strauss & Co.,* 916 F.2d 453, 456-457 (8th Cir. 1990).

IV. *The Respondent's Mitigation Defenses*

The Respondent sought to reduce its back pay liability by asserting that Spiekermeier and Patterson failed to mitigate back pay, and that Arnold and Spiekermeier failed to report all their interim earnings. As previously noted, any such issues raised in the previous compliance hearing for the period preceding that hearing are settled. The Respondent has focused in this hearing on the period since November 2000.

A. Arnold

The Respondent contends that Arnold failed to report all his interim earnings for calendar year 2001. The Respondent relies upon Arnold's 2001 income tax return which includes a W-2 from Temp Associates-Burlington Inc. showing $23,817.27 in "wages, tips and other compensation". The General Counsel, in the compliance specification, reported interim earnings of $812.40 in the first quarter of 2001 and $954.27 in the second quarter of 1991 for a total of $1,766.67 for the year, far less than what was claimed on his income tax return. Because the W-2 from Temp Associates does not indicate when this income was earned, the Respondent suggests it be spread equally among the quarters in the 2001 back pay period. Even if this amount is spread among all four quarters of the calendar year, it would exceed the gross back pay sought for Arnold in the second quarter, which is the only quarter for which such a claim is made. Under the Respondent's view, Arnold would have no net back pay for 2001, even before applying the adjustment factor.

The Respondent called Arnold as a witness and asked him to verify that the W-2 from Temp Associates reflected $23,817.27 of income for 2001. Arnold was asked no other questions about this subject. Arnold testified that he worked until he suffered a stroke on May 24, 2001 and that he retired after that.[16] However, he volunteered that he did return to work at some later point although he could not recall when. Notwithstanding this testimony, neither the

[15] The Respondent was represented by the same law firm at that hearing, although by different counsel. The Respondent in fact stipulated at that hearing to the interim earnings as reported in the specification.

[16] Arnold's 1991 tax return does show receipt of funds from the Union's pension fund in 2001.

General Counsel nor the Charging Party sought additional back pay beyond May 24, 2001.

Because the General Counsel is only seeking back pay for Arnold for the period prior to May 24, 2001, any unreported interim earnings would have to be shown to have been received for work performed prior to that date to reduce back pay. It should also be noted that General Counsel does not seek back pay for the first quarter of 2001 based on a determination that Arnold would not have been employed by the Respondent in that quarter. Thus, any income received in the first quarter would be irrelevant. In order to reduce its back pay obligation to Arnold, the Respondent would have to establish that interim earnings in addition to those reported by the General Counsel were earned by Arnold in the second quarter of 2001. This the Respondent has failed to do.

It is important to note that the Respondent had the opportunity to question Arnold about the wages received from Temp Associates but chose not to do so. Instead, the Respondent would have me assume that at least enough of this income was earned in the second quarter to wipe out the remaining $1767.83 of net back pay claimed on Arnold's behalf. Because Arnold returned to work at some unknown date after May 24, 2001, it is possible that all or a portion of these wages were earned after the back pay period ended. Based on Arnold's prior earnings history, it is unlikely he would have earned all of the $23,817.27 reflected on the W-2 in the approximately 20 week period before May 24, which would tend to support a finding that he did return to work before the end of 2000. Because of the uncertainty surrounding when this additional income was earned, and the Respondent's failure to seek clarification from Arnold while he was on the witness stand, I must find that the Respondent has failed to meet its burden of proof on this issue. Accordingly, I shall not recommend that any portion of the W-2 earnings from Temp Associates be used to offset the back pay sought for Arnold for 2001.[17]

B. Patterson

The Respondent argues that Patterson should be denied any back pay for the period from 2001 through the first quarter of 2004 because he failed to properly mitigate damages by remaining employed on a part-time basis at the Des Moines Historical Society. Patterson admitted in his testimony that he did not look for other work during this period because he already had a job. Only after he was laid off by the Historical Society, on March 5, 2004, did Patterson look for other work. Evidence in the record shows that he obtained employment after this layoff through the Union's hiring hall and had substantial interim earnings through the remainder of the back pay period.

When the Respondent questioned Patterson at the hearing about his work with the Historical Society, Counsel for General Counsel objected that the issue of mitigation had been settled in the prior proceeding. There is no dispute that, although the Respondent had evidence at the November 2000 hearing regarding the part-time nature of Patterson's work with the Historical Society, it did not question his efforts to find other work. In his decision following that hearing, Judge Ladwig noted specifically that the Respondent did not contend that Patterson was not diligently seeking work during the back pay period to that point in time. The Respondent

[17] Although the Respondent cited cases in which the Board has denied back pay to a discriminatee in any quarter for which the discriminatees has willfully concealed interim earnings, the Respondent made no effort here to show any willful failure to disclose by Arnold. See *Ad Art, Inc.,* 280 NLRB 985, n. 2 (1986); *American Navigation,* 268 NLRB 426 (1983). In fact, there was no concealment because it was Arnold who submitted the tax returns and W-2 to the Regional Office.

did not raise any issue regarding Patterson's mitigation efforts in its appeals to the Board or the Court of Appeals. In fact, it was Patterson's employment with the Historical Society that the Court used as an example to illustrate how an award of back pay should be determined on remand. Because there was no change in the nature or extent of work Patterson was performing for the Des Moines Historical Society after the 2000 hearing, the issue whether this constituted proper mitigation is precluded by the prior findings.

Even assuming the issue may be raised on remand as to the period since the last hearing, I conclude based on the evidence before me that Patterson properly mitigated his losses by remaining employed with the Des Moines Historical Society until he was laid off in March 2004. I note that the work he performed at the Historical Society was carpentry work. Because he was able to work indoors during the winter, he could work year round and was not subject to the seasonal variation of other carpentry work. Moreover, the location of this job, close to Patterson's home, avoided expenses he might have incurred to take a job at a distance from his home which would not have lasted as long.

Under well-established Board law, the sufficiency of a discriminatee's efforts to mitigate are to be determined by the totality of evidence. The discriminatee's efforts must be considered in the context of the entire back pay period. *Midwestern Personnel Services,* 346 NLRB No. 58 (February 28, 2006) and cases cited therein. Here, under the methodology employed by the General Counsel to determine the amount of gross back pay owed to Patterson, a method stipulated to be reasonable, it was determined that Patterson would have worked an average of approximately 28 hours a week during the back pay period (13,048 hours divided by 463 weeks in the back pay period). This is before application of the adjustment factor devised by the Court, which would reduce work deemed to be available with the Respondent even further. Even if one considers the amount of work available with the Respondent on a quarterly basis, there are only six quarters, out of thirty-six total quarters in the back pay period, in which Patterson would have worked 40 hours a week or more for the Respondent. There were eleven quarters in the back pay period in which the General Counsel determined that Patterson would have worked 25 hours or less per week for the Respondent. In this context, Patterson's decision to remain steadily employed, averaging 25 hours a week, for almost seven years with one interim employer, is sufficient to satisfy his duty to mitigate. Accordingly, I find that the Respondent has failed to meet its burden of proving that Patterson failed to exercise reasonable diligence in searching for work during the back pay period.

C. Spiekermeier

The Respondent argues that Spiekermeier should receive no back pay for the period from the third quarter of 2002 through the end of the back pay period, i.e. the third quarter of 2004, because he did not diligently search for work in that period.[18] Respondent argues further that Spiekermeier is not entitled to any back pay for 2003 and 2004 because he failed to report all his income from self-employment. It should be noted that the General Counsel is not seeking back pay for every quarter in these periods. Under the accepted methodology for determining gross back pay, the General Counsel determined that Spiekermeier would not have worked for the Respondent in the first two quarters of 2003 and the first quarter of 2004.

[18] Judge Ladwig found in the prior compliance proceeding that the Respondent failed to meet its burden of showing that Spiekermeier did not diligently search for work prior to November 2000. The Board adopted this finding and the Court of Appeals, in remanding the case for a re-calculation of back pay, did not raise any issue with this finding. This finding is preclusive in this proceeding.

The General Counsel's compliance specification shows no interim earnings for Spiekermeier for six quarters of the back pay period, from July 1, 2002 through December 31, 2003. The General Counsel reports a total of $5,234.40 in interim earnings for the first three quarters of 2004. Spiekermeier testified that he was unable to find work from mid 2002 until the end of the back pay period and that, sometime in 2003, he started his own construction business from which he derived about $5000 in net income in 2004. Spiekermeier admitted that his efforts to find work before starting his business were limited to contacting the Union's business agent, Jim Decker, about once each quarter to ask about work. According to Spiekermeier, Decker told him there was no work for him. Decker corroborated this testimony to the extent that he testified that work was slow in 2003 and 2004 and that he had many members out of work. Respondent argues the fact that Patterson was sent on a job by the Union in 2004 establishes that there was work available for Spiekermeier. However, the Respondent did not establish the existence of any specific job that Spiekermeier was offered and declined. According to Decker, when he had calls for carpenters, he sent out the first person to call in, assuming equal qualifications. Decker also testified that the Union's hiring hall was not exclusive and that employers were free to hire directly and to request employees by name.

Spiekermeier testified that, because there was no work available through the Union, he decided to go into business for himself. Although Spiekermeier had difficulty recalling specific jobs he worked on in 2003 and 2004, he estimated that he spent about 25 hours a week working in his business. His wife kept the books and an accountant prepared the tax returns, which are in evidence. Spiekermeier's income tax returns for 2003 and 2004 show gross revenue from his business of $46,748 and $55,734, respectively, with a net loss for 2003 and net income of $5,816 for 2004. Spiekermeier testified at the hearing that he occasionally withdrew money from his business account to give to his wife to pay bills or for personal expenses. He estimated this amounted to about $5000 in the course of a year.

It is well-established that the Respondent bears the burden of proving affirmatively that Spiekermeier failed to exercise reasonable diligence in searching for work during the back pay period. *NLRB v. Mooney Aircraft,* 366 F.2d 809, 812-813 (5th Cir. 1966); *NLRB v. Brown & Root, Inc.,* supra; *Midwestern Personnel Services,* supra. The Board has consistently held that an honest, good faith effort is all that is necessary and that a discriminatee need not be successful in seeking employment to establish reasonable diligence. A discriminatee need only follow his usual method of looking for work to satisfy the duty to mitigate. Moreover, the sufficiency of a discriminatee's efforts is based on all of the circumstances, including his efforts over the entire back pay period, and is not based on isolated portions. See *Midwestern Personnel Services,* supra, and cases cited therein. The Board has long held that self-employment is sufficient to satisfy the duty to mitigate and that *net earnings*, rather than *gross revenue,* from self-employment is what should be deducted as interim earnings. *Heinrich Motors*, 166 NLRB 783 (1967), enfd. 403 F.2d 145, 148 (2d Cir. 1968); *Cassis Management Corp.,* 336 NLRB 961, 968 (2001); *Performance Friction Corp.,* 335 NLRB 1117, 1122-1123 (2001).

I find that the Respondent has not met its burden of establishing a failure to mitigate by Spiekermeier. By focusing on six quarters of the back pay period in 2002 and 2003, out of a total of 36 quarters, the Respondent ignores Spiekermeier's work history throughout the back pay period. The compliance specification shows that Spiekermeier had at least some interim earnings in every quarter until the third quarter of 2002 and that, in several quarters, his interim earnings exceeded what he would have earned if he had continued working for the Respondent. Moreover, because of the adjustment factor devised by the Court, Spiekermeier's back pay award is reduced to 28% of what General Counsel initially claimed he would have been entitled to under the Board's remedial order. When considered in this context, Spiekermeier's efforts

throughout the back pay period are more than adequate under Board law.

I find further that Spiekermeier's decision to start his own business and his efforts in that regard were sufficient to satisfy his duty to mitigate. *Heinrich Motors*, supra. The Respondent argues, however, that Spiekermeier had far more income from his business than he reported on his tax returns, pointing to the deposits made to the bank account which Spiekermeier identified as his business account. However, it is impossible to determine from the face of these bank statements the source of the money deposited. There is nothing in the record to establish that all of the money deposited to this account represented revenue from work performed by Spiekermeier. The only reliable evidence in the record of the amount of revenue Spiekermeier derived from his business is what was reported on his federal tax return prepared by the accountant. Absent evidence that these returns are fraudulent, I will not speculate that Spiekermeier had other income from self-employment. I note that, in *Midwestern Personnel Services,* supra, the Board adopted the administrative law judge's finding that it was appropriate to use net income from self-employment, as reported on a discriminatee's tax returns, as interim earnings. The Respondent also contended here that any income from self-employment that Spiekermeier re-invested in the business by purchasing capital assets should be treated as interim earnings. The Board rejected this same contention when it adopted the judge's findings in *Midwestern Personnel Services,* supra, in the face of exceptions to that finding.

The Respondent also argues that the amounts which Spiekermeier withdrew from his business for personal expenses should be counted as interim earnings, citing *Boland Marine,* 285 NLRB 624, 628 (1987). I note that the amounts claimed as interim earnings in the General Counsel's specification for the first three quarters of the back pay period are equivalent to the amount Spiekermeier acknowledged withdrawing from the business for personal use. Absent evidence of any other withdrawals, I am not prepared to speculate as to the amount by which Spiekermeier's back pay should be reduced further. It is the Respondent's burden to prove such offsets from gross back pay.

Based on the above, I find that the Respondent has not met its burden of proving that the back pay owed to Spiekermeier should be reduced either because of a failure to mitigate or because of unreported interim earnings. I note that the Respondent has offered no evidence that Spiekermeier willfully concealed any income from the General Counsel or the Board. Thus, the Board's decision in *American Navigation,* supra, is inapposite.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[19]

ORDER

The Respondent, McKenzie Engineering Co., Fort Madison, Iowa, its officers, agents, successors, and assigns, shall make the following payments in accordance with the National Labor Relations Board's Decision and Order in 326 NLRB 473 (1998), as enforced by the Court of Appeals at 182 F.3d 622 (8th Cir. 1999), plus interest on the back pay amounts as computed in *New Horizons for the Retarded,* 283 NLRB 1173 (1987), and interest on the fringe benefit contributions to be determined in accordance with *Merryweather Optical Co.,* 240 NLRB 1213,

[19] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

1216, fn. 7 (1979):

Employee	Back Pay	Fringe Benefits
Fred Arnold	$ 3,567.02	$ 2,558.56
Donald Patterson	69,891.35	4,404.44
Steve Perry	3,826.43	0
Mark Spiekermeier	22,885.10	1,519.24
Total	100,169.90	8,482.24

Dated, Washington, D.C., March 23, 2006.

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Michael A. Marcionese
Administrative Law Judge